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In the Supreme Court of the United States

October Term, 1982

JOHN DEMJANJUK,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
To the United States Court of Appeals
For the Sixth Circuit

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QUESTIONS PRESENTED[1]

1. Is the right of a jury trial available to a denaturalization defendant?

2. Should the Sixth Amendment be expanded to meet the new dangers created by the investigation and prosecution of "Nazi Collaborator Denaturalization Cases"?

3. Should government witnesses, especially eyewitness identification witnesses, be compelled to personally confront a defendant in "Nazi Collaborator Denaturalization "cases", rather than simply appearing via video tape?

4. Should documents or copies of documents from foreign countries be admitted into evidence if (a) such copies are not properly certified in accordance with the Rules of Evidence, and (b) such documents fail to meet any of the exceptions to the hearsay provisions of the Rules of Evidence?

5. Does a defendant in a "Nazi Collaborator Denaturalization" case have the right to have counsel present at all post-complaint identification procedures?

6. Does a trial court have the duty to consider, and a defendant in a "Nazi Collaborator Denaturalization" case the right to present, qualified expert evidence regarding the photographic identification procedures used by the government?

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1. Over 30 denaturalization and related proceedings have been brought against alleged war criminals between 1977 and 1981, and more than 200 others are under investigation. All the cases are prosecuted by a special arm of the Justice Department known as the Office of Special Investigations. As a result, the issues raised in this case have been raised in other cases and will continue to be raised as more of these matters are brought to trial.

7. Should an eyewitness identification be considered per se unreliable where the photospread and attendant procedures employed are unnecessarily suggestive, and the time between the event and the confrontation is extreme?

8. Should the trial court grant a new trial where among other things, the moving party establishes that given the opportunity to fully explore newly discovered evidence, the outcome of the case may in fact be different?

9. Should this Court establish rules and guidelines to assure defendants in "Nazi Collaborator Denaturalization Cases" due process of law before more of these matters are tried?

TABLE OF CONTENTS

Questions Presented 1
Opinions Below 1
Jurisdiction 1
Constitution, Statutes and Rules Involved 2
Statement of the Case 2

Reasons for Granting the Writ—

I. The Lower Court Ruling That a Denaturalization Defendant Is Not Entitled to a Jury Trial, Is a Question of Substantial Constitutional Import Which Should Be Decided by This Court 4

(A) The Fifth Amendment - Due Process of Law 4

(B) Article III, §2 and the Sixth Amendment 7

(C) Equal Protection of Law 10

(D) The Seventh Amendment 11

II. The Lower Court Ruling That the Government Need Not Provide the Petitioner With the Necessary Costs of Litigation Is in Conflict With Prior Sixth Amendment Decisions of This Court 13

III. The Determination of Standards for Permitting Video Tape Deposition Testimony at Trial in Lieu of the In-Court Appearance of a Witness Under the Facts and Circumstances of Cases Such As This Raises Important Questions of Federal Law Which Ought to Be, but Have Not Been, Decided by This Court 16

IV. The Determination of Standards for Admitting Documents and Copies of Documents From Foreign Countries Pursuant to the Rules of Evidence Raises Important Issues of Federal Law, Which Ought to Be, but Have Not Been, Decided by This Court 18

V. Whether a Defendant Is Denied Due Process of Law, Under the Facts and Circumstances of Cases Such As This, When Post-Complaint Identification Procedures Are Conducted Outside the Presence of Defense Counsel, Is a Matter of Substantial Constitutional Import That Should Be Decided by This Court 22

VI. The Determination of Standards for the Admission of Expert Testimony Concerning Photographic Identification Procedures in Cases Such As This Presents Issues of Federal Law Which Should Be Decided by This Court 27

VII. The Determination of Standards for Determining Whether a Photospread and the Attendant Identification Procedures Employed Is Unnecessarily Suggestive and Ultimately Unreliable in Cases Such As This Is a Question of Substantial Constitutional Import Which Should Be Decided by This Court 29

VIII. The Lower Court Ruling That the Petitioner Was Not Entitled to a New Trial Where Newly Discovered Evidence, If Given the Opportunity to Be Fully Explored, Could Clearly Alter the Outcome of the Case, Presents an Important Question of Federal Law Which Should Be Decided by This Court 31

(A) The Failure of the Government to Provide the Petitioner With the Affidavit of Chaim Sztajer 31

(B) The Failure of the Government to Provide the Petitioner With the Names and and Statements of Five Potential Soviet Witnesses 35

(C) Need for a New Trial 37

IX. The Determination of Rules and Guidelines Must Be Provided by This Court in Order to Assure the Defendants in These "Nazi Collaborator Denaturalization Cases" Due Process of Law 37

Conclusion 40

Appendix A - Opinion of the United States Court of Appeals, Sixth Circuit A1

Appendix B - Decision and Order of United States District Court A4

Appendix C - Constitutional Provisions, Statutes, and Rules:

Constitution of the United States:

Article III, Sec. 2 ..... A58
5th Amend. A58
6th Amend. A59
7th Amend. A59
14th Amend. A59

8 U.S.C. 1251 (a) A60
8 U.S.C. 1253 (h) A72

Federal Rules of Civil Procedure:

Rule 26(e) A73
Rule 59(a) A73

Federal Rules of Evidence:

Rule 103 ..... A74
Rule 902 ..... A75

TABLE OF AUTHORITIES

Cases

Argersinger v. Hamlin, 407 U.S. 25 (1972) 13
Banco de Espana v. Federal Reserve Bank, 114 F.2d 438 (2d Cir. 1940) 19
Baumgartner v. United States, 322 U.S. 665 (1944) 6, 11
Bell v. Wolfish, 441 U.S. 520 (1979) 8
Berger v. United States, 295 U.S. 78 (1935) 14
Brady v. Maryland, 373 U.S. 83 (1963) 14
Chaunt v. United States, 364 U.S. 350 (1960) 5, 6
Curtis v. Loether, 415 U.S. 189 (1974) 11
Dimick v. Schiedt, 293 U.S. 474 (1935) 12
Durkin v. Pet Milk Co., 14 F.R.D. 385 (D.C. Ark. 1953) 34
English v. Mattson, 214 F.2d 406 (5th Cir. 1954) 37
Galloway v. United States, 319 U.S. 372 (1943) 6, 7
Gebhard v. Isbrandtsen Co., 10 F.R.D. 119 (D.C. N.Y. 1950) 34
Gideon v. Wainwright, 372 U.S. 335 (1963) 13
Griffin v. Illinois, 351 U.S. 12 (1956) 16
Jiminez v. Weinberger, 417 U.S. 628 (1974) 10
Kennedy v. Mendoza-Martinez, 372 U.S. 144 (1963) 7, 8, 9, 10
Klapprott v. United States, 335 U.S. 601 (1949) 8, 10
Knauer v. United States, 328 U.S. 654 (1946) 11
Linnas v. United States, United States Supreme Court, Writ of Certiorari, Case No. 81-2336 22
Mathews v. Eldridge, 424 U.S. 319 (1976) 5, 6
Neil v. Biggers, 409 U.S. 188 (1972) 30

Ng Fung Ho v. White, 259 U.S. 276 (1922) 4, 5, 7
Parklane Hosiery Co. v. Shore, 439 U.S. 322 (1979) 7, 11
Powell v. Alabama, 287 U.S. 45 (1932) 13
Schneiderman v. United States, 320 U.S. 118 (1943) 5, 10
Singer v. United States, 380 U.S. 24 (1965) 5
State v. Manuel, 20 N.C. 20 (1838) 12
United States v. Ash, 413 U.S. 300 (1973) 13, 14, 23, 24, 25, 26, 38
United States v. Fedorenko, 455 F. Supp. 893 (S.D. Fla. 1978) *rev'd on other grounds*, 449 U.S. 490 (1981) 17, 27, 29, 30, 40
United States v. IBM Corp., 83 F.R.D. 92 (D.C. S.D. N.Y. 1979) 34
United States v. Kairys, United States District Court for the Northern District of Illinois, Eastern Division, Case No. 80-C-4302 15
United States v. Perea, 458 F.2d 535 (10th Cir. 1972) 37
United States v. Telfaire, 469 F.2d 552 (D.C. App. 1972) 27
United States v. Wade, 388 U.S. 219 (1967) 1 26
United States v. Walus, 616 F.2d 283 (7th Cir. 1980) 28, 29, 40
United States v. Williams, 571 F.2d 344 (6th Cir. 1978) 19
United States v. Wong Kim Ark, 169 U.S. 649 (1898) 12
Weinberger v. Wiesenfeld, 420 U.S. 636 (1975) 10

United States Constitution

Article III, §2 .....7, 8, 10
Fifth Amendment 4, 10
Sixth Amendment 7, 8, 10, 13
Seventh Amendment 11, 12
Fourteenth Amendment 10

Statutes

8 U.S.C. §1425(a) 9
8 U.S.C. §1451(a) 2, 9
8 U.S.C. §1451(g) 9

Rules

Fed. R. Civ. P.:

Rule 26(e) 32
Rule 59(a) 31

Fed. R. Ev.:

Rule 902 ..... 18, 19

Other Authorities

BLACKSTONE'S COMMENTARIES ON THE LAW OF ENGLAND (1769) 12

BORCHARD, CONVICTING THE INNOCENT (1932) 27

Comment, *Did Your Eyes Deceive You? Expert Psychological Testimony on the Unreliability of Eyewitness Identification*, 29 STAN. L. REV. 969, 1006 n.173 (1977) 27

Comment, *Pre-Statutory Denaturalization*, 35 CORNELL L.Q. 120 (1949) 9

FRANK AND FRANK, NOT GUILTY (1957) 27

FRANKFURTER, THE CASE OF SACCO AND VANZETTI (1927) 27

Gorphe, *Showing Prisoners to Witnesses for Identification*, 1 AM. J. POLICE SCI. 79 (1930) 27

Hearings Before the Subcommittee on Oversight of The Permanent Select Committee on Intelligence, House of Representatives (February 6, 19, 1980) 21

Hogan, *Joseph Story on Juries*, 37 ORE. L. REV. 234 (1958) 12

HOUTS, FROM EVIDENCE TO PROOF (1956) 27

McGowan, *Constitutional Interpretation and Criminal Identification, 4th Annual G.B. Sherwell Lecture*, 12 WM. & MARY L. REV. 235 (1970) 27

RADIN, HANDBOOK OF ANGLO-AMERICAN LEGAL HISTORY 287 (1936) 12

Smit, *International Aspects of Federal Civil Procedure*, 61 COL. L. REV. 1031 (1961) 19

WALL, EYEWITNESS IDENTIFICATION IN CRIMINAL CASES, (1965) 27

Weekly Compilation of Presidential Documents, Vol. 17, No. 5 (February 2, 1981) 21

WENTWORTH AND WILDER, PERSONAL IDENTIFICATION (1918) 27

WIGMORE, EVIDENCE, Section 786(a) (3d Ed. 1940) 27

WIGMORE, THE SCIENCE OF JUDICIAL PROOF (3d Ed. 1937) 27

3 WRITINGS OF THOMAS JEFFERSON (Washington Ed.) 71 6-7

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OPINIONS BELOW

The opinion of the District Court is officially reported at 518 F. Supp. 1362 (D.C. Ohio 1981), and is set forth in Appendix (hereinafter "Appx.") B, *infra*, p. A4.

The summary affirmance of the Court of Appeals (Kennedy, Martin, and Phillips, JJ.) (Appx. A, *infra*, pp. A1) is not yet reported.

JURISDICTION

The judgment of the Court of Appeals was entered on June 8, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES INVOLVED

The relevant constitutional provisions, statutes and rules involved herein are set forth as Appendix C, p. A58.

STATEMENT OF THE CASE

1. On August 25, 1977, the United States of America commenced an action in the District Court, pursuant to 8 U.S.C. §1451(a), to revoke petitioner's Certificate of Naturalization and vacate the order admitting him to citizenship. The basis for this action was a complaint alleging that the petitioner had served Nazi Germany during World War II as a concentration camp guard in Poland, and that the petitioner, upon entry into the United States in 1952, concealed such service from the immigration authorities.

2. Petitioner's answer denied these allegations and a jury trial was demanded. The District Court struck the jury demand upon motion of the government.

3. On two occasions, prior to trial, the petitioner moved the District Court for the government to provide the petitioner with the necessary costs of litigation. On both occasions, the motion was overruled.

4. Also prior to trial, the government, over the objection of the petitioner, was permitted to take the video tape depositions of three government witnesses. The District Court, at trial, permitted the use of such video tape depositions in lieu of the witnesses' appearance in court.

5. At trial, the evidence against the petitioner consisted of basically two types: (a) foreign documents and (b) eyewitness photographic identification testimony.

(a) The primary piece of documentary evidence offered by the government was GX 5 and 6, which was commonly referred to throughout the proceedings as the Trawniki Training Card. The petitioner objected to the admission of GX 5 and 6 on several grounds all of which were overruled by the trial court. Through GX 5 and 6, the government attempted to establish that the petitioner had trained at Trawniki which was a camp used by the Germans to train guards for deployment as concentration camp guards.

(b) The government also offered the eyewitness photographic identification testimony of several survivors of the Treblinka concentration camp as well as the photographic identification testimony of a German guard stationed at Treblinka. The petitioner not only objected to the photospreads and attendant procedures employed on Fifth and Sixth Amendment grounds, but also attempted to call as a witness a qualified expert in the area of photographic identifications. The District Court overruled all such objections and refused to permit the expert witness to testify.

6. After the conclusion of the trial, but prior to the rendering of a decision by the District Court, a government attorney forwarded to defense counsel, with a carbon copy to the court, a letter which stated that the government had "inadvertently" neglected to give the petitioner all the discovery he was entitled to prior to trial. The letter stated that the government had neglected to give the petitioner the names and statements of five potential Soviet witnesses. The letter also stated that the government was of the opinion that its failure to provide the petitioner with such names and statements was of no consequence in that such statements only "contain further incriminatory information and support for the government's case."

Further, after the conclusion of the trial, but prior to the rendering of a decision by the District Court, the petitioner, without the assistance of the government, discovered the affidavit of a Treblinka survivor who claimed that a denaturalization defendant from Chicago, was Ivan the Terrible from Treblinka.

Based upon the government's letter and the Treblinka survivor affidavit, the petitioner moved the District Court for a new trial. The motion was overruled.

7. The District Court ordered petitioner denaturalized and the Court of Appeals summarily affirmed that decision.

REASONS FOR GRANTING THE WRIT

I. THE LOWER COURT RULING THAT A DENATURALIZATION DEFENDANT IS NOT ENTITLED TO A JURY TRIAL IS A QUESTION OF SUBSTANTIAL CONSTITUTIONAL IMPORT WHICH SHOULD BE DECIDED BY THIS COURT.

(A) The Fifth Amendment - Due Process of Law

The petitioner's right to trial by jury follows from both ancient principles and modern understanding of the role of the jury in insuring due process of law.[2]

This Court has long recognized that proceedings like the government's against the petitioner must comport with due process. *Ng Fung Ho v. White*, 259 U.S. 276 (1922). Moreover, recently, this Court has indicated that in cases

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2. "No freeman shall be arrested, or detained in prison, or deprived of his freehold, or outlawed, or banished, or in any way molested; and we will not set forth against him, nor send against him, unless by the lawful judgment of his peers and by the law of the land." W. McKechnie, Magna Carta 436 (1905).

such as these, the petitioner, in order to be assured due process, must be afforded a jury trial. In *Mathews v. Eldridge*, 424 U.S. 319 (1976) this Court set out the standard for determining whether due process requires a particular procedure:

> [O]ur prior decisions indicate that identification of the specific dictates of due process generally requires consideration of three distinct factors: First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Under the first test of *Mathews*, the government's action against petitioner threatens him with permanent loss of vital private interests; namely, his life, *Ng Fung Ho v. White, supra* at 284-85, and liberty. "The issue in these cases is. . . important to the liberty of the citizen. . . ." *Chaunt v. United States*, 364 U.S. 350, 353 (1960).

Secondly, petitioner faces the same, if not greater, risk of wrongful deprivation of his rights by government arbitrariness as he would in a criminal prosecution. The jury trial right is "intended to protect the accused from oppression by the Government. . . ." *Singer v. United States*, 380 U.S. 24, 31 (1965).[3]

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3. In *Schneiderman v. United States*, 320 U.S. 118 (1943) at 159, this Court warned against reasoning under which "the security of the status of our naturalized citizens might depend, in considerable degree, upon the political temper of majority thought and the stresses of the times." The strong feelings behind the government's current campaign against alleged "Nazi war criminals" creates a risk that a citizen's security may be jeopardized by "the stresses of the times."

Further, no government interest outweighs the petitioner's need for a jury trial. Guaranteeing naturalized citizens right to trial by jury would impose no significant burden on the government. Any additional cost would be insubstantial in light of the issues involved. The government's interest in a marginal reduction of cost does not outweigh the petitioner's interest in the additional security which a jury trial affords.

This Court has stated that "[i]n striking the appropriate due process balance the final factor to be assessed is the *public* interest," not exclusively the government's interest as prosecutor. *Mathews v. Eldridge*, *supra* at 347 (emphasis added). The public interest calls for a broad, not narrow, reach for the jury trial right to protect all Americans' civil liberties:

> The founders of our government thought that trial of facts by juries rather than by judges was an essential bulwark of civil liberty. For this reason, among others, they adopted Article III, §2 of the Constitution, and the Sixth and Seventh Amendments. *Galloway v. United States*, 319 U.S. 372, 397 (1943) (Black, *J.*, dissenting).

Denaturalization cases peculiarly call for jury trial. They "deal with 'judgments lying close to opinion regarding the whole nature of our Government and the duties and immunities of citizenship.'" *Chaunt v. United States*, *supra* at 353, *quoting*, *Baumgartner v. United States*, 322 U.S. 665, 671 (1944). Basic principles of our democracy demand citizen involvement in judgments like these.

Citizen participation insures that the proceedings do not betray the tenets of the Republic. Thomas Jefferson wrote: "I consider trial by jury as the only anchor ever yet imagined by man which a government can be held to the principles of its constitution." 3 WRITINGS OF

THOMAS JEFFERSON (Washington ed.) 71, *quoted in, Parklane Hosiery Co. v. Shore*, 439 U.S. 322 at 343 n.10 (1979) (Rehnquist, J., dissenting) and *Galloway v. United States*, *supra* at 397, n.1 (Black, J., dissenting). Appropriately, citizen jurors should decide, in the first instance, whether a fellow-citizen loses his rights.

The public interest also necessitates that naturalized citizens enjoy the same rights as the native born. Authorizing the government to strip a naturalized citizen of "the right to have all other rights" without a jury, not only is, but appears unjust.[4] That appearance of justice strikes hardest at the millions of naturalized citizens, many of whom have made large sacrifices to become Americans.

The absence of a jury in these cases has the appearance of a legal technicality and thus offends the ordinary American's sense of fairness.

Denaturalization and deportation threaten the accused with "loss . . . of all that makes life worth living." *Ng Fung Ho v. White*, *supra* at 284. The jury trial provides an important safeguard to the accused, impinges no substantial interest of the prosecution, and promotes the public interest. Due process of petitioner thus includes a trial by jury.

(B) Article III, §2 and the Sixth Amendment

This Court has held that forfeiture of citizenship is penal and has "throughout history been used as a punishment." *Kennedy v. Mendoza-Martinez*, 372 U.S. 144 (1963) at 168 n.23. Moreover, denaturalization has consequences which "may be more grave than consequences that

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4. The appearance of injustice is peculiarly acute in that the government could not strip native-born Americans of their citizenship without according them a jury trial. *Kennedy v. Mendoza-Martinez*, *supra*.

flow from conviction from crimes." *Klapprott v. United States*, 335 U.S. 601 (1949) at 611 (opinion of Black, *J.*) Article III, §2 and the Sixth Amendment to the Constitution therefore guarantee petitioner a jury.

When the government proceeds against an individual on a cause "essentially penal in nature," the Constitution guarantees the accused criminal procedural safeguards, including the right to trial by jury. *Bell v. Wolfish*, 441 U.S. 520, 535-40 (1979); *Kennedy v. Mendoza-Martinez*, *supra* at 164. In *Mendoza-Martinez*, *supra* at 168-69, this Court itemized the relevant considerations to determine whether a cause is "essentially penal":

> [1] Whether the sanction involves an affirmative disability or restraint, [2] whether it has historically been regarded as punishment, [3] whether it comes into play only on a finding of *scienter*, [4] whether its operation will promote the traditional aims of punishment—retribution and deterrence, [5] whether the behavior to which it applies is already a crime, [6] whether an alternative purpose to which it may rationally be connected is assignable for it; and [7] whether it appears excessive in relation to the alternative purpose assigned are all relevant to the inquiry, and may often point in differing directions. Absent conclusive evidence of congressional intent as to the penal nature of a statute, these factors must be considered in relation to the statute on its face.

Under each aspect of the *Mendoza-Martinez* analysis the government's prosecution of the petitioner qualifies as "essentially penal." Moreover, *Mendoza-Martinez* identified the sanction the government seeks here—loss of citizenship—as a penalty. Denaturalization costs the individual the right to have all other rights.

Further, the government will seek to deport petitioner to either West Germany or the Soviet Union once it has denaturalized him.[5] Thus, petitioner's deportation to either country will probably mean the total loss of liberty for life or possibly the loss of life itself.

The sanctions the government seeks against petitioner have historically been regarded as punishment. In *Mendoza-Martinez, supra* at 168 n.23 the Court noted:

> [F]orfeiture of citizenship and the related devices of banishment and exile have throughout history been used as punishment.

Tracking the fourth facet of *Mendoza,* the behavior leading to the denaturalization sanction under 8 U.S.C. §1451(a) is already a crime. Title 8 United States Code, §1425 makes unlawful acquisition of citizenship a felony. Conviction under that provision automatically results in loss of citizenship. 8 U.S.C. §1451(g).

The first statute outlawing denaturalization abuses was a criminal statute. 2 Stat. 11 (1813). Moreover, until the Act of 1906, the only remedies for naturalization frauds were criminal penalties. See, Comment, *Pre-Statutory Denaturalization,* 35 CORNELL L.Q. at 121.[6]

This Court has identified no "alternative purpose" for denaturalization apart from punishment. Rather, this Court has recognized that "[d]enaturalization consequences may be more grave than consequences that flow

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5. There can be no doubt as to the government's intention to deport the petitioner. In fact, despite the pendency of petitioner's appeal, the government has illegally attempted to commence deportation proceedings and has caused the petitioner to be unlawfully incarcerated in jail for a period of ten days.

6. In this regard, it is noteworthy that the government places the Office of Special Investigations, specially funded for these proceedings, in the Criminal Division of the Justice Department.

from conviction for crimes." *Klapprott v. United States, supra* at 611. As a result, it has progressively extended criminal procedural safeguards to defendants in denaturalization actions. *Schneiderman v. United States, supra* at 160; *Klapprott v. United States, supra* at 612.

Under this Court's standards, the sanction the government seeks against the petitioner is penal. Article III, §2 and the Sixth Amendment therefore guarantee him right to trial by jury.

(C) Equal Protection of the Law

Fifth Amendment "due process of law" also requires the Federal Government to insure equal protection of the laws.[7] As a component of due process, the guarantee of equal protection insures naturalized citizens, like the native-born, a trial by jury when the government moves to take away their citizenship.

In *Kennedy v. Mendoza-Martinez, supra,* this Court held that the Fifth and Sixth Amendments guarantee native citizens the right to jury trial when the government moves to take away their citizenship. In denying a jury-trial in denaturalization proceedings, the government is creating two classes of citizens; native born and naturalized.

This Court has repeatedly emphasized the equality of naturalized and native-born:

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7. While the Fifth Amendment contains no equal protection clause, this Court's "approach to Fifth Amendment equal protection claims has always been precisely the same as to equal protection claims under the Fourteenth Amendment." *Weinberger v. Wiesenfeld,* 420 U.S. 636, 638 n.2 (1975). See also *Jiminez v. Weinberger,* 417 U.S. 628, 637 (1974) (denial of benefits to illegitimate children "denies the former [illegitimate children] the equal protection of the laws guaranteed by the due process provision of the Fifth Amendment.")

> Citizenship obtained through naturalization is not a second-class citizenship. It has been said that citizenship carries with it all of the rights and prerogatives of citizenship obtained by birth in this country "save that of eligibility to the Presidency." *Knauer v. United States*, 328 U.S. 654 (1946) at 658. See also, *Baumgartner v. United States, supra* at 673.

Therefore, equal protection of the laws guarantees that naturalized citizens stand on equal footing with native citizens, and thus must receive the same procedural protections.

(D) The Seventh Amendment

The Seventh Amendment also bars the government from denaturalizing and deporting the petitioner without attending him a jury. The Seventh Amendment "preserve[s] the right to jury trial as it existed in 1791." *Parklane Hosiery Co. v. Shore, supra* at 333. In 1791, the government could not strip a citizen of his rights and expel him from the country without resort to a jury trial. At that time, most Americans thought their new Constitution prevented the government from taking away their rights without resort to a jury. The Revolution had, in part, been fought because the King and Parliament had violated these ancient principles.

The Seventh Amendment provides: "In Suits at common law where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved. . . ." This Court stated the scope of the Seventh Amendment jury-trial right in *Curtis v. Loether*, 415 U.S. 189, 193 (1974):

> Although the thrust of the [Seventh] Amendment was to preserve the right of jury trial as it existed in 1791,

> it has long been settled that the right extends beyond the common-law forms of action recognized at that time.

The scope of the Seventh Amendment under these principles squarely covers the government's proceeding against the petitioner.

"In order to ascertain the scope and meaning of the Seventh Amendment, resort must be had to the appropriate rules of the common law established at the time of the adoption of that constitutional provision in 1791." *Dimick v. Schiedt*, 293 U.S. 474, 476 (1935). As understood on both sides of the Atlantic in 1791, the common-law guarantee of jury trial under Magna Carta covered any government effort to take a citizen's right and deport him. *See* 4 BLACKSTONE'S COMM. 343.[8]

Further, Blackstone reflected American's understanding of their common-law heritage. "There is no doubt that for many early American lawyers, Blackstone was the common law, because, for one thing, they often had no other book." RADIN, HANDBOOK OF ANGLO-AMERICAN LEGAL HISTORY 287 (1936) quoted in, Hogan, *Joseph Story on Juries*, 37 ORE. L. REV. 234 (1958).

All in all, it is apparent that the issues presented herein are of the highest magnitude. Further, as more of these Nazi Collaborator Denaturalization cases are prosecuted, the issue will keep reappearing. Accordingly, the writ should issue.

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8. " 'The term "citizen", as understood in our law, is precisely analogous to the term "subject" in the common law, and the change of phrase has entirely resulted from the change of government. The sovereignty has been transferred from one man to the collective body of the people and he who before was a "subject of the king" is now "a citizen of the state." ' " *United States v. Wong Kim Ark*, 169 U.S. 649, 664 (1898) quoting *State v. Manuel*, 20 N.C. 20, 24-26 (1838).

II. THE LOWER COURT RULING THAT THE GOVERNMENT NEED NOT PROVIDE THE PETITIONER WITH THE NECESSARY COSTS OF LITIGATION IS IN CONFLICT WITH PRIOR SIXTH AMENDMENT DECISIONS OF THIS COURT.

Over the years this Court has continually embellished upon the English Common Law concept of assistance of counsel. *Powell v. Alabama*, 287 U.S. 45 (1932); *Gideon v. Wainwright*, 372 U.S. 335 (1963); *Argersinger v. Hamblin*, 407 U.S. 25 (1972). It has been the posture of this Court to expand the parameters of the Sixth Amendment whenever "new contexts" arise presenting the same dangers that gave birth to the right itself. *United States v. Ash*, 413 U.S. 300 (1973). The petitioner herein respectfully submits that it is time, once again, for this Court to expand the Sixth Amendment to meet the dangers presented by the vast number of cases being investigated and tried in this country and commonly referred to as the "Nazi Collaborator Denaturalization Cases."

Initially, the right to counsel arose because of the advent of professional prosecuting attorneys and modern law enforcement machinery and techniques. However, it is doubted that this Court ever contemplated that a single citizen of the United States would be confronted by a special prosecutorial staff of the Justice Department in concert with the police and prosecutorial staffs of foreign governments throughout the world.[9] As a result, the dangers of prejudice befalling the petitioner herein, and

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9. Foreign involvement in this particular case came primarily from Israel, West Germany, and the Soviet Union. Each foreign government played an integral role in finding and interviewing potential government witnesses, conducting identification procedures, compiling documents, and providing expert witnesses to testify at trial.

defendants in similar circumstances are present in every aspect of the government's case.

> Pretrial photograph identifications, however, are hardly unique in offering possibilities for the actions of the prosecutor unfairly to prejudice the accused. Evidence favorable to the accused may be withheld; testimony of witnesses may be manipulated; the results of laboratory tests may be contrived. In many ways the prosecutor, by accident or by design, may improperly subvert the trial. The primary safeguard against abuses of this kind is the ethical responsibility of the prosecutor, who, as so often has been said, may "strike hard blows" but not "foul ones". *Berger v. United States*, 295 U.S. 78, 88 (1935); *Brady v. Maryland*, 373 U.S. 83, 87-88 (1963); *United States v. Ash*, *supra* at 320.

But not all countries hold in high esteem the constitutional safeguards and procedures valued by our system of jurisprudence. Thus, who can say that an Israeli police officer conducting a photographic identification in Israel will abide by the standards of due process.[10] As a result, defendants in these types of cases, must be afforded some constitutional safeguard to insure that come the time for trial, they will be afforded due process of law.

Because of the very nature of these types of cases—the extreme passage of time (over 35 years), witnesses worldwide, foreign language barriers, and expert witnesses dealing with documents, photographs, historical background, and immigration procedure—unless a particular defendant is extremely wealthy, the costs of investigation and discovery are not only prohibitive but

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10. This exact circumstance occurred numerous times. See *infra* discussion regarding photographic identification procedures.

completely unreachable. On the other hand, the only means of attempting to assure such a defendant due process of law is to place him on equal footing with the government having similar pretrial investigative and discovery opportunities.[11]

The petitioner, realizing his inability to effectively conduct pretrial investigations and discovery, moved the trial court on two occasions for the necessary costs of litigation. On both occasions, the petitioner's motions were overruled citing the fact that the petitioner was not totally and completely destitute.

Pretrial procedures may effectively determine the outcome of a matter long before trial especially where the events at issue occurred over 35 years ago. *United States v. Wade*, 388 U.S. 219 (1967). Thus, in order to assure that the trial is more than a mere formality, both parties must have equal opportunities to prepare their respective cases. This the petitioner did not have the opportunity to do. The petitioner did not have the opportunity to confront identification witnesses during the pretrial identification procedures. Nor did the petitioner have the opportunity to depose any of the government witnesses prior to trial except for those that the government chose to video tape. Nor did the petitioner have the opportunity to meaningfully confront the original of GX 5 and 6 (Trawniki Training Card) when it arrived from the Soviet Union in the midst of trial. Further, the petitioner did not have the opportunity to hire investigators to seek and question defense witnesses who resided throughout the world. And further, the petitioner did not have sufficient

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11. At least one trial court has recognized this problem. In *United States v. Luidas Kariys*, U.S.D.C. for the N.D. of Illinois, Eastern Div. #80-C-4302 the trial court assigned a law firm with substantial financial resources, as well as manpower, to attempt to balance the inherent inequities between the litigants.

funds for the expert witnesses and interpreters needed to prepare and present his defense. Rather than both sides having an equal opportunity to present evidence and testimony, the trial evolved into a proceeding whereby he who could afford to present evidence did and he who could not, did not.

When a defendant is deprived of the necessary tools to present his defense—be it expert witnesses, investigators, transcripts or the like—the defendant is denied effective assistance of counsel and due process of law. *Griffin v. Illinois*, 351 U.S. 12 (1956). Thus, it is respectfully submitted that this Court once again meet the "new contexts" and dangers presented by these "Nazi Collaborator Denaturalization Cases." Accordingly, the writ should issue.

III. THE DETERMINATION OF STANDARDS FOR PERMITTING VIDEO TAPE DEPOSITION TESTIMONY AT TRIAL IN LIEU OF THE IN-COURT APPEARANCE OF A WITNESS, UNDER THE FACTS AND CIRCUMSTANCES OF CASES SUCH AS THIS, RAISES IMPORTANT QUESTIONS OF FEDERAL LAW WHICH OUGHT TO BE, BUT HAVE NOT BEEN, DECIDED BY THIS COURT.

In February, 1980, the government requested and was permitted to conduct video tape depositions of Otto Horn and Heinrich Schaefer in West Germany.[12] Thereafter, in January, 1981, the government, once again, was permitted to take a video tape deposition of International Refugee Organization expert, Daniel Segat, in New York

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12. In West Germany, the government had at their disposal U.S. Army personnel from the Armed Forces Network to man cameras for the video depositions.

City. The petitioner objected to such video taping at the time the government made the initial requests with the trial court as well as at trial. All objections were overruled.

As to the two West Germans, the government claimed that their appearance in the trial court may prove embarrassing and cause them to lose their privacy. The prospect of a witness losing his privacy and facing public embarrassment is no excuse for his nonappearance at trial.

As to Segat, the government claimed that Segat would be unavailable for the trial. This excuse is as lame as that tendered for the two West Germans. The government had over three years to line up its witnesses for this trial. In three years the government should be able to arrange for a witness' appearance in court.

The similarities between the instant lawsuit and a criminal trial are inescapable. Although the instant matter is technically a suit in equity, using the civil rules, the ramifications are totally criminal. Although the petitioner may not be afforded all the rights afforded a criminal defendant, the petitioner must be afforded due process of law. Certainly, fairness and equity dictate, at the very least, that all witnesses, especially eyewitnesses such as Horn, must confront the defendant in open court. As Judge Roettger stated in *United States v. Fedorenko*, 455 F. Supp. 893, 897 (S.D. Fla. 1978), *reversed on other grounds*, 449 U.S. 490 (1981).

> Early in November, 1977, the court learned of the government's intention to take depositions out of the country. Because it was concerned that the government might intend to produce only deposition testimony of foreign witnesses, the court sua sponte entered an order prohibiting the use of deposition tes-

timony at trial in order to enable the court to observe the witnesses' faces, body language and reactions in the courtroom, particularly in the presence of the defendant and also his reactions to their testimony. The court felt that in-court testimony would be particularly critical in view of the passage of 35 years since the events complained of at Treblinka.

The same reasoning is equally applicable to the case at bar. Therefore, it is respectfully submitted that this Court establish some firm guidelines for the admission of video tape testimony, especially in cases which deal with the taped eyewitness testimony relating events over 35 years prior. Accordingly, the writ should issue.

IV. THE DETERMINATION OF STANDARDS FOR ADMITTING DOCUMENTS AND COPIES OF DOCUMENTS FROM FOREIGN COUNTRIES PURSUANT TO THE RULES OF EVIDENCE RAISES IMPORTANT ISSUES OF FEDERAL LAW, WHICH OUGHT TO BE, BUT HAVE NOT BEEN, DECIDED BY THIS COURT.

Although the trial court, in its opinion, failed to state the precise grounds for the admission of GX 5 and 6[13] into evidence, the petitioner is under the impression that the trial court was of the opinion that the copies of the Trawniki Training Card satisfied Rule 902 of the Rules of Evidence and as a result became automatically admissible. If so, this is clearly erroneous. Even if Rule 902 is satis-

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13. GX 5 and 6 are copies of the front and back of the document commonly referred to throughout the trial as the Trawniki Training Card. The document purports to be an official Nazi identification card issued to concentration camp guards and in this particular instance issued to one named Ivan Demjanjuk. The card contains among other things, biographical data and an alleged photograph of the bearer. The documents were attested to by an official of the Soviet Union.

fied,[14] such documents are nevertheless inadmissible unless they fall within an exception to the hearsay rule.

The touchstone to the admission of hearsay evidence is the trustworthiness of the evidence offered. *United States v. Williams*, 571 F.2d 344 (6th Cir. 1978). Therefore, prior to the admission of any hearsay evidence, pursuant to any hearsay exception, the offering must establish that the evidence is in fact trustworthy. As to GX 5 and 6, the government failed to do this.

From the outset, the trustworthiness of GX 5 and 6 are clouded by the fact that no one who testified at trial had ever seen a similar card.[15] Further, the government in response to a certain interrogatory question propounded by the petitioner stated that GX 6 was the only document of such type ever prepared by the supply room at Trawniki.

Further, the method of circumstances of preparation of GX 5 and 6 do not lend credence to the truthworthiness of the document. The document was allegedly prepared in the midst of World War II in conjunction with a covert

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14. The petitioner never conceded that GX 5 and 6 satisfied Rule 902. In fact, it is apparent that Rule 902 can never be satisfied where an official of one foreign country (Soviet Union) attests to a document prepared by another foreign government (Nazi Germany). See Smit, *International Aspects of Federal Civil Procedure*, 61 COL. L. REV. 1031, 1060-61 n.131, 1062, 1065 (1961). "The faith placed in certified copies of official records . . . is based . . . upon the assumption that the oath and certificate of the custodian may reasonably be relied upon." *Banco de Espana v. Federal Reserve Bank*, 114 F.2d 438, 446 (2d Cir. 1940). If the custodian is from another country such an assumption becomes meaningless.

15. In fact, Dr. Wolfgang Scheffler, a West Berlin historian called by the government as an historical expert during the Nazi years, was unquestionably of the opinion that GX 5 and 6 were two separate and distinct documents. But when the original document surfaced in the midst of trial, Dr. Scheffler was found to be unquestionably wrong.

operation known as Action Reinhard, namely: the systematic extermination of the European Jews. The operation was run by the clandestine German SS. Further, the only person alive that could have shed some light on the preparation and trustworthiness of the Trawniki Training Card, Karl Streibel, the former commander of Trawniki, was never brought forth by the government to testify.[16]

And finally, we must look to the custodian of the document, the Soviet Union. The government theorized that the Trawniki Training Card was captured by the Russians in their westward drive toward Berlin. Then, for some reason, the Soviets filed the document away in one of their archives for over thirty years only to have the card surface to be used in the prosecution of a person who to this day the Soviet Union considers a traitor. Can we trust the custodian of this document, especially where the custodian fails to testify?

First, how did the Soviets actually come into possession of this document? This question was never answered. Nor was it ever established how the Soviets could capture the identification card without capturing the bearer of the card. Moreover, if the Soviets had the card in 1948, and had not captured the bearer, why did they not supply the name on the card to the Allies so that his name would appear on the collaborator lists. According to the undisputed testimony of Ed O'Connor, the Soviets supplied names for these lists through 1950. And finally, if this

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16. In May, 1980, defense counsel traveled to Hamburg, West Germany in order to cross-examine Streibel at a deposition called by the government, but for some unexplained reason, Streibel did not appear for the deposition. Defense counsel submitted an affidavit to the trial court stating that, "On May 8, 1980, I spoke with Streibel on the telephone, through the services of an interpreter, and was advised by Karl Streibel that at about 9:00 a.m. on May 8, he received a telephone call that the deposition had cancelled."

document is truly truthworthy, why was the original only produced by the Soviets in the midst of trial, and why did the Soviets not permit any testing upon the original to determine its date of origin.

Can we trust a country that since World War II has been our most severe critic and staunchest opponent in providing our courts with reliable documents? Can we trust a government that declares all people of Russian heritage to be Soviet citizens? Can we trust a government that has persecuted Ukranians beyond the Iron Curtain?[17]

The only conclusion that can be reached is that such documents provided by the Soviet Union are untrustworthy until proven otherwise by the government. This the government did not do in the instant matter.

Furthermore, the issues surrounding the admission and trustworthiness of documents from less than trustworthy foreign regimes is bound to crop up time and again

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17. President Reagan in answering questions at a news conference on January 29, 1981, stated unequivocally that he was of the opinion that the Soviet government would commit any crime, lie and cheat, to achieve their international revolutionary goals. Weekly Compilation of Presidential Documents, February 2, 1981, Vol. 17 - No. 5 at 66-67. Also see, Hearings Before the Subcommittee On Oversight of The Permanent Select Committee on Intelligence; The House of Representatives, re: Soviet Covert Action, February 6, 19, 1980, where in the Appendix at page 63 thereto is a CIA Study which notes:

"Documentary forgeries, which contain false, misleading or incomplete information, may be fabricated out of whole cloth or they may be altered versions of genuine documents and official forms which have been obtained by Soviet espionage agents. In both cases, the Soviets use such forgeries in elaborate deception games with the governments, media, and people of their leading adversaries. Anti-U.S. Government forgeries always convey implicitly or explicitly a false or distorted message about U.S. foreign policy intentions and actions, and they are designed to influence their intended recipient ("the victim") to reach conclusions or take actions which the forger believes will serve his own interest while undermining those of his opponent ("the enemy"). Depending upon their content, documentary forgeries

(Continued on following page)

as more of these "Nazi Collaborator Denaturalization Cases" are tried.[18] Accordingly, the writ should issue.

V. WHETHER A DEFENDANT IS DENIED DUE PROCESS OF LAW, UNDER THE FACTS AND CIRCUMSTANCES OF CASES SUCH AS THIS, WHEN POST-COMPLAINT IDENTIFICATION PROCEDURES ARE CONDUCTED OUTSIDE THE PRESENCE OF DEFENSE COUNSEL, IS A MATTER OF SUBSTANTIAL CONSTITUTIONAL IMPORT THAT SHOULD BE DECIDED BY THIS COURT.

On August 25, 1977, the government filed the complaint in the instant matter with the District Court. Of the six government witnesses whose testimony was heard regarding out-of-court photographic identification of the

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Footnote continued—

may have a political, military, economic or counterintelligence slant; in practice most of them—and all of those discussed today—have a political purpose.

Forgeries may also be classified according to their intended recipient or victim. One type is aimed at misleading foreign government leaders and opinion-makers, thereby warping the decisionmaking process in the target country. Technically speaking, this is the "disinformation" or misinformation type of forgery; it is normally surfaced by "agents of influence" with access to higher government circles in the target country and almost never receives public attention. A second type of forgery, which may be called the propaganda forgery, is directed at molding public opinion in the target country or countries. It is usually planted surreptitiously in the foreign media in such a way that the Soviet hand is not revealed. After it has received sufficient replay in the non-communist media, the forgery is then almost always exploited by Soviet propagandists to support unsubstantiated allegations made in the official media which would otherwise appear spurious and unconvincing without "documentary" evidence to back them up.

18. The question of foreign documents supplied by an untrustworthy regime is presently before this Court on Petition for Writ of Certiorari in *Karl Linnas v. United States.* (United States Supreme Court Case No. 81-2336).

petitioner, or of a photograph alleged to be that of the petitioner,[19] only one witness, Elijahu Rosenberg, made a photographic identification prior to the filing of the complaint.

After the filing of the complaint, the remaining five identification witnesses viewed various photospreads for the first time. In addition, Rosenberg also viewed another photospread after the filing of the complaint. Four of the six witnesses made their photographic identifications in Israel under the direction of Israeli police investigators. One witness made his photographic identification in West Germany and the other in New York City, both under the direction of United States government investigators.

At trial, the government relied exclusively upon out-of-court photographic identifications by its witnesses to attempt to prove the identity of the person alleged to be Iwan the Terrible from the Treblinka Death Camp. None of the witnesses attempted an in-court identification. The defense objected to the testimony of each and every witness regarding their out-of-court photographic identifications.

Although it has been held that a criminal defendant does not have the absolute right to have defense counsel present at a post-indictment photographic identification procedure, *United States v. Ash, supra,* cases such as *Ash* and other Sixth Amendment and due process decisions of this Court strongly suggest that under extraordinary facts and circumstances due process requires the presence of defense counsel at post-complaint identification procedures.

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19. All the photospreads used at trial contained either the visa photograph of the petitioner or the Trawniki Training Card photograph from GX 6 which was alleged to be a photograph of the petitioner.

The basic reason for the initiation of rules requiring the presence of defense counsel at certain stages of a prosecution is a "desire to minimize the imbalance in the adversary system that otherwise resulted with the creation of a professional prosecuting official." *United States v. Ash, supra* at 309. Thus, where "new contexts" appear which present the same dangers which initially gave birth to the necessity of defense counsel's presence at post-complaint proceedings, the parameters of the rule must likewise expand to encompass such new and unique situations. *United States v. Ash, supra* at 311. Thus, the question presented is not whether due process absolutely or does not absolutely require defense counsel to be present at all post-complaint photographic identification procedures, but rather under the extraordinary facts and circumstances of the instant case, whether due process requires the presence of defense counsel at post-complaint photographic identification procedures.

In looking to the extraordinary facts and circumstances surrounding this case, it is apparent that this type of case presents "new contexts" in which due process requires the presence of defense counsel at post-complaint identification procedures. First, as gave birth to the rule requiring defense counsel present at certain stages of a judicial proceeding, the government has created and maintains a special office which is staffed and financed to handle matters dealing exclusively with the denaturalization of suspected World War II Nazi war criminals. Further, the network of the government's special office goes beyond the manpower and resources available to them in the United States. The network encompasses American manpower throughout the globe and the zealous cooperation of foreign governments. This international network is very evident in the instant case. Participation of the

Israeli, West German and Soviet Government is readily apparent, while the cooperation of other foreign governments, while not as evident, is nevertheless present. Obviously, a single individual defendant who has been employed in a factory for 30 years cannot compete with such an international conglomerate of manpower and financial resources.[20] Moreover, absent the petitioner's inability to conduct effective discovery, the petitioner, even if he possessed the necessary finances, could not compel any foreign citizens to be deposed or appear for trial.

But the question remains, how does the petitioner's inability to compete with the government in the pretrial preparation of the lawsuit or in bringing witnesses to the courtroom for trial bear upon the pretrial photographic identification procedures and due process. In *United States v. Ash*, *supra*, this Court held that the usual criminal defendant is not entitled to have defense counsel present at post-indictment photographic displays because two safeguards usually ensure the detection, at trial, of unfair photographic proceedings. The safeguards are: (1) defense counsel's ability to reconstruct the photographic identification procedure, and (2) the ethical responsibility of the prosecutor in overseeing the photographic identifi-

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20. This is clearly illustrated by the fact that the majority of the petitioner's discovery was limited to the propounding of interrogatories. Moreover, all of the defendant's experts, with the exception of Ed O'Connor from nearby Buffalo, were from the Greater Cleveland area. By contrast, the government had experts from West Germany, Washington, D.C. California, Maryland, Georgia, and New York City, in addition to three survivor witnesses from Israel, one from West Germany, and one from Uruguay, and the two deposition witnesses in West Germany. Furthermore, while the petitioner was unable to depose any of the government's witnesses, the government deposed all of the petitioner's witnesses, including the petitioner on two occasions, and Dr. Detterman, who did not testify at trial. The only witnesses not deposed were the petitioner's reputation witnesses.

cation. *United States v. Ash, supra* at 318 and 320. In this case, the safeguards simply do not exist.

First, defense counsel had no opportunity to reconstruct the post-complaint photographic identification procedures. None of the investigators who conducted the photographic identification procedures were brought by the government to testify in court nor could the defendant subpoena such foreign investigators to testify in this country. And even if the defendant's subpoena power was available, the cost of bringing such witnesses to Cleveland, Ohio was clearly prohibitive.

> The defendant's inability to effectively reconstruct at trial any unfairness that occurred at the photographic identification procedure deprives the defendant of his only opportunity to meaningfully attack the credibility of the witness' in-court testimony as to the sureness of their out-of-court identification. *United States v. Wade, supra* at 231-232.

Thus it cannot be said that no greater limitations have been placed upon defense counsel in the instant case, "in constructing displays, seeking witnesses, and conducting photographic identifications than those applicable to the prosecution." *United States v. Ash, supra* at 318.[21]

Secondly, although the petitioner does not question the integrity of the Assistant United States Attorneys involved in the trial of this lawsuit, the fact remains that the government attorneys cannot assure this Court that

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21. Although the government listed the investigators who conducted the photographic identification procedures in its pretrial brief as witnesses to be called at trial, they were never called by the government. The petitioner can only surmise as to their nonappearance, but their nonappearance was certainly calculated and not happenstance.

the photographic identifications conducted in Israel were done so fairly and impartially without the striking of any foul blows.[22]

For these reasons, and because tactics like these will continually be employed by the government in the prosecution of these types of cases, the writ should issue.

VI. THE DETERMINATION OF STANDARDS FOR THE ADMISSION OF EXPERT TESTIMONY CONCERNING PHOTOGRAPHIC IDENTIFICATION PROCEDURES IN CASES SUCH AS THIS PRESENTS ISSUES OF FEDERAL LAW WHICH SHOULD BE DECIDED BY THIS COURT.

Although the admission of expert testimony is subject to the sound discretion of the trial court, courts and commentators have expressed concern over the inadequacies of eyewitness identifications.[23] Further, while the identification procedures in a given case may seem on their surface to the non-expert to be unsuggestive, an ex-

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22. Clearly this is a problem as evidenced by Judge Roettger's comments in *United States v. Fedorenko, supra* at 906 regarding the procedures adopted by the Israeli investigators conducting the photographic identification procedures. The same investigators conducted the identification procedures in this case.

23. See: Lecture by McGowan, *Constitutional Interpretation and Criminal Identification*, 4th Annual G.B. Sherwell Lecture, October, 1970, printed in 12 WM. & MARY L. REV. 235 (1970); E. BORCHARD, CONVICTING THE INNOCENT (1932); J. FRANK & B. FRANK, NOT GUILTY (1957); F. FRANKFURTER, THE CASE OF SACCO AND VANZETTI (1927); M. HOUTS, FROM EVIDENCE TO PROOF (1956); P. WALL, EYEWITNESS IDENTIFICATION IN CRIMINAL CASES (1965); B. WENTWORTH & WILDER, PERSONAL IDENTIFICATION (1918); J. WIGMORE, THE SCIENCE OF JUDICIAL PROOF (3d Ed. 1937); 3 J. WIGMORE, EVIDENCE SECTION 786a (3d Ed. 1940); Gorphe, *Showing Prisoners to Witnesses for Identification* 1 AM. J. POLICE SCI. 79 (1930). Comment, *Did Your Eyes Deceive You? Expert Psychological Testimony on the Unreliability of Eyewitness Identification*, 29 STAN. L. REV. 969, 1006 n.173 (1977). Also see: *United States v. Telfaire*, 469 F.2d 552 (D.C. App. 1972).

pert within the area of eyewitness identification may be able to detect certain flaws within the identification procedure which reaches just the opposite conclusion.

In the instant matter, the trial court would not permit the petitioner to present the testimony of a qualified expert witness regarding the inherent bias in two of the photospreads used by the government in identification procedures. The trial court was of the opinion that it did not need any expert assistance in dealing with the photospreads.

When considering the extraordinary set of facts and circumstances presented by the instant case, and similar "Nazi Collaborator Cases," one would think that the trier of fact would welcome all relevant expert testimony to assist in deciding the issues of the case. This would seem to be especially true where the proffered expert testimony deals with identification procedures in a case which involves eyewitness identification done exclusively from photospreads over 35 years after the event has transpired. When dealing with such a situation no stone should be left unturned. The trial court has a duty as both judge and fact finder to be certain that the photospreads used by the government were as "clinically impartial as humanly possible to construct." *United States v. Walus*, 616 F.2d 283, 293 (7th Cir. 1980). The trial court in the case at bar violated that duty when it failed to permit the expert photographic identification testimony. As a result, the petitioner was denied due process of law. Accordingly the writ should issue.

VII. THE DETERMINATION OF STANDARDS FOR DETERMINING WHETHER A PHOTOSPREAD AND THE ATTENDANT IDENTIFICATION PROCEDURES EMPLOYED IS UNNECESSARILY SUGGESTIVE AND ULTIMATELY UNRELIABLE IN CASES SUCH AS THIS IS A QUESTION OF SUBSTANTIAL CONSTITUTIONAL IMPORT WHICH SHOULD BE DECIDED BY THIS COURT.

Throughout the pendency of this lawsuit, the petitioner has put forth the proposition that the photospreads and attendant procedures employed by the government were unnecessarily suggestive, and thereby conducive to an irreparable mistaken identification. The trial court did not concur with the petitioner's proposition. The difference in opinion between the petitioner and the trial court centers about what constitutes unnecessary suggestiveness under the facts and circumstances presented by Nazi Collaborator Denaturalization Cases.

The standard adopted by the petitioner was simply not pulled out of the blue as the trial court may have suspected. But rather the petitioner adopted the standards of two courts which had previously dealt with this exact problem. The appellate court in *United States v. Walus, supra* at 293 and the trial court in *United States v. Fedorenko, supra* at 906, held that the photospreads should be as "clinically impartial as humanly possible to construct" and that the attendant procedures employed be done so "under laboratory conditions." The standards adopted by the trial court in the instant matter were certainly not as stringent.[24]

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24. This is an understatement in that GX 17 was the same photospread employed in *United States v. Fedorenko, supra*, and declared by the trial court to be unnecessarily suggestive. In GX 17 the photographs of Demjanjuk and Fedorenko are side by side on page 3.

This court has previously established the guidelines for determining whether an identification subsequently made after a suggestive identification procedure is in fact unreliable. *Neil v. Biggers*, 409 U.S. 188 (1972). The test adopted by *Biggers* is a totality of the facts and circumstances test with all factors being weighed equally. But the *Biggers* test cannot be applied in the same manner to a case where all the identifications occur 33 to 35 years after the event. One factor, simply because it is so glaring, must carry the determinative weight above all the others.

> With a time interval of 35 years, rather than days or a few weeks as in the typical criminal case, the threshold of what suggestibility becomes impermissible must necessarily be lowered. The court cannot find a decision considering the question with a time lag of many years duration. The Supreme Court did observe in *Neil v. Biggers*, 409 U.S. 188, 93 S. Ct. 375, 34 L. Ed. 401 (1972) that a lapse of seven months between the event and the confrontation ". . . would be a seriously negative factor in most cases." Id. at 201, 93 S. Ct. at 383. In the instant case where there is a gap of almost 35 years between the event and the witnesses' ability to observe the suggestive photospreads, the photospread should have been as clinically impartial as humanly possible to construct. *United States v. Fedorenko, supra* at 905-906.

Therefore, where the photospreads and the attendant procedures employed are not "clinically impartial" nor conducted "under laboratory conditions", the subsequent identification must be deemed per se unreliable where the lapse of time between the event and confrontation is extreme. Therefore, so that these standards are employed in this case and in future cases of this type, the writ should issue.

VIII. THE LOWER COURT RULING THAT THE PETITIONER WAS NOT ENTITLED TO A NEW TRIAL WHERE NEWLY DISCOVERED EVIDENCE, IF GIVEN THE OPPORTUNITY TO BE FULLY EXPLORED, COULD CLEARLY ALTER THE OUTCOME OF THE CASE, PRESENTS AN IMPORTANT QUESTION OF FEDERAL LAW WHICH SHOULD BE DECIDED BY THIS COURT.

After trial, but prior to rendering of a decision by the trial court, the petitioner moved the trial court to declare a mistrial.[25] The motion was based upon three independent grounds, two of which will be discussed herein.

(A) The Failure of the Government to Provide the Petitioner With the Affidavit of Chaim Sztajer

After the conclusion of the trial, but prior to the rendering of a decision by the trial court, the petitioner, without the assistance of the government, came into possession of an affidavit given by Treblinka survivor Chaim Sztajer to the United States Counsel in Melborne, Australia in September, 1980. The affidavit reflects that Sztajer, after seeing a newspaper photograph of Luidas Kariys, a defendant in a similar case in Chicago, identified Kariys as the Iwan from Treblinka. This affidavit although made in September, 1980, and received by the government during such month, was never forwarded to the petitioner.[26]

The trial court maintains that merely because the government provided the defendant with Sztajer's name

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25. The trial court treated the motion as a motion for new trial based upon newly discovered evidence. See Rule 59, Rules of Evidence.

26. In September, 1980, one of the government's attorneys in the Demjanjuk matter was also trial attorney of record in the *Kariys* case.

in response to an interrogatory question propounded by the petitioner which asked for names and addresses of individuals who viewed various photospreads and failed to select a photograph either of the petitioner or alleged to be of the petitioner, that the government was under no duty to supply the petitioner with Sztajer's September, 1980, affidavit. This contention is clearly at issue.

First, Sztajer's name was provided in May, 1980, when the government responded to the interrogatory question mentioned above. This was four months prior to Sztajer signing the affidavit. Therefore, even if Sztajer had been immediately contacted by defense counsel upon the disclosure of his name, the affidavit, not having been prepared, would never have been discovered. Moreover, any attempt by defense counsel to correspond with Sztajer would have been fruitless because the government provided the petitioner with an inaccurate address for him.

Secondly, the government has a duty to supplement discovery matters pursuant to Rule 26(e), Rules of Civil Procedure which provides for the supplemental production of the names of people having knowledge of discoverable matters. Further, the government's duty to supplement discovery emanates from the government's agreement to do so as illustrated by the numerous occasions the government, without first being compelled to do so, supplemented its interrogatory answers. This duty to supplement was clearly breached by the government.

In the First Set of Interrogatories Propounded by Defendant to the Government, the petitioner asked:

> State the name and last known address of every person known to the United States Attorney for the Northern District of Ohio, Eastern Division, or his agents, employees, or representatives who claim to have any

knowledge of the alleged actions of the Defendant alleged in Counts I through VI of Plaintiff's complaint.

Chaim Sztajer's name never appeared in response to such interrogatory question. The government contends that because Sztajer, in the government's opinion, "misidentified" Ivan the Terrible, that Sztajer has no knowledge of the alleged actions of the defendant as alleged in the complaint. But, the government must remember that the instant lawsuit was not only brought by the government under the name of John Demjanjuk, but also under the names Ivan Grozny and Ivan the Terrible. Therefore, any knowledge of the defendant, Ivan the Terrible, held by a potential witness must be included in response to the above interrogatory question.

Further, the above interrogatory question was directly followed by a question which asked if any of the individuals named in the previous question had made a statement of some sort. Therefore, had the government properly answered the first question, the petitioner, by virtue of the subsequent question would have been aware of Sztajer's statement and been able to secure a copy thereof as well as his appearance at trial.

The fact that Sztajer's name was provided in an answer to a different interrogatory is of no consequence. Due to the petitioner's limited financial resources and the abundance of names of potential witnesses, residing all over the world, given to defense counsel by the government, not to mention investigation and inquiry as to defenses and defense witnesses, the petitioner was compelled to discriminately select and contact or investigate only those witnesses of substantial import. But had the government answered the interrogatories properly and in good faith, without the preconception that only the peti-

tioner could be Ivan the Terrible, then Sztajer would clearly have been one of the petitioner's most important people to personally contact.

Thirdly, the affidavit of Chaim Sztajer should have been given to the defendant pursuant to the petitioner's November, 1977 Request for Production of Documents. One thing that must be remembered when addressing the Request for Production of Documents is the type of case at hand. This is not a typical "civil" case where the names of witnesses and their statements are known by all parties and usually easily accessible to both. This case involves events which allegedly occurred in 1942-1943, with all the potential eyewitnesses residing in Europe, South America, the Middle East, and Australia. As a result, the petitioner had to rely upon discovery and the good faith of the government for the names and statements of persons with knowledge of the case, and the petitioner was compelled by necessity rather than by design to phrase the Request for Production of Documents in a broad rather than specific manner. See: *United States v. IBM Corp.*, 83 F.R.D. 92 (D.C., S.D.N.Y. 1979).

Moreover, although the government had previously supplied Sztajer's name, the government nevertheless still had a duty to produce Sztajer's affidavit. This is especially true where the names of potential witnesses provided the defendant are extremely numerous, and it would be a great hardship, financial or otherwise, upon the petitioner to attempt to contact each and every person. *Gebhard v. Isbrandtsen Co.*, 10 F.R.D. 119 (D.C.N.Y., 1950); *Durkin v. Pet Milk Co.*, 14 F.R.D. 385 (D.C. Ark., 1953).

Therefore, the government had the duty to provide the petitioner with the name of Sztajer in response to the proper interrogatory question and the duty to provide the petitioner with Sztajer's affidavit. The government

breached those duties. Clearly, this evidence was of the highest magnitude and not merely cumulative. No other Treblinka survivor had come forward and identified another as the Ivan of that camp.

(B) The Failure of the Government to Provide the Petitioner With the Names and Statements of Five Potential Soviet Witnesses

After the conclusion of the trial, but prior to the rendering of a decision by the trial court, the government, by letter, advised defense counsel of five additional Soviets who had been interviewed by Soviet authorities regarding this case. Of the five, one identified a photograph suspected of being a photograph of the petitioner as a person who served at Trawniki. The other four failed to make any photographic identifications. In addition, all five made statements regarding the Trawniki training camp as they all were admitted trainees of such facility. The petitioner contends that the government should have advised him of these potential witnesses and the information they possessed prior to trial. The information regarding the Soviet witnesses' names and statements was requested by the petitioner in various interrogatory questions and by the petitioner's Request for Production of Documents. Furthermore, each and every set of interrogatories, as well as the Request for Production of Documents, directed the government to timely supplement its responses. This the government did do on numerous occasions, but inexcusably failed to do so on this occasion.

The petitioner's main interest in these potential Soviet witnesses is their knowledge of the Trawniki Training Card. All five are admitted Trawniki trainees and as consequence should have some knowledge of the identification cards used there. If so, such testimony would be the

only first-hand evidence available to the trial court as to the trustworthiness of GX 5 and 6.[27]

Further, the protocols, although brief, provide additional fuel for the fire of controversy that surrounds GX 5 and 6. None of the five protocols, although taken in late 1980, indicate that the witnesses were shown GX 5 and 6 and asked whether or not such document was familiar. This seems peculiar in that the trial was only a couple of months away, and because the Soviet witnesses were asked to try and identify the photograph from GX 6 but were never shown the entire card. Further, there is an indication from the protocols of three of the Soviet witnesses that GX 5 and 6 differ from the identification cards issued these Soviets while they were at Trawniki. The protocols of those three Soviets indicate that their Trawniki identification cards carried the trainee's fingerprints.[28]

As a result, further doubt is cast upon the trustworthiness and ultimate admissibility of GX 5 and 6. The trial court considered this to be at best cumulative and speculative which it certainly may be absent the petitioner being given the opportunity to confront these potential witnesses. But given the opportunity, the end result could very well spell the demise of GX 5 and 6 and in turn the government's entire case.

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27. One other witness, Heinrich Schaefer, was a Trawniki trainee, but very early in the camp's existence. Further, Schaefer being of German descent was treated differently than other trainees as evidenced by his job as paymaster of the Trawniki camp.

28. The trial court in its opinion states that the protocols do not support the contention that the fingerprints were also on the trainee's identification cards, but the statements clearly speak of the cards and fingerprinting together. (In the statements of Orlovoskii and Kharkovsky the two are mentioned in the same sentence and in Kolgushkin's statement in consecutive sentences.) Without further inquiry, the trial court's conclusion seems more unreasonable than the petitioner's.

(C) Need for a New Trial

It is apparent that the government's failure to provide the petitioner with Sztajer's affidavit and the names and statements of the five Soviets deprived the petitioner of evidence that in all likelihood was critical to his defense. Clearly, if the petitioner would have had the opportunity to personally communicate with Sztajer and the Soviets, and the information gathered from such sources was in accord with what the petitioner fully expects, the presentation of such evidence would clearly alter the verdict of the trial court.[29] Moreover, it cannot be said that the newly discovered evidence is merely cumulative where the issue of the identity of the infamous Ivan and the trustworthiness of the Trawniki Training Card become seriously clouded. Thus, a new trial should have been granted. *English v. Mattson*, 214 F.2d 406 (5th Cir. 1954); *United States v. Perea*, 458 F.2d 535 (10th Cir. 1972). Accordingly, the writ should issue.

IX. THE DETERMINATION OF RULES AND GUIDELINES MUST BE PROVIDED BY THIS COURT IN ORDER TO ASSURE THE DEFENDANTS IN THESE "NAZI COLLABORATOR DENATURALIZATION CASES" DUE PROCESS OF LAW.

The instant lawsuit has been categorized as a suit in equity. A suit in equity implies the dispensing of justice between the parties in an equal and impartial manner. It is a lawsuit which contemplates fairness and due process.

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29. This Court could remand this matter to the trial court for the limited purpose of permitting the petitioner, at the government's expense, to investigate the information possessed by Sztajer and the Soviets.

It is a lawsuit which contemplates all parties having an equal opportunity to pursue pretrial matters outside the courtroom so that when the trial begins all parties stand on equal footing. In other words, one party does not come to trial armed with a howitzer while the other carries only a slingshot.

Clearly, procedural rules, statutes, and court decisions have seen fit to establish certain guidelines which attempt to assure equality at trial. Rules and guidelines are meant to deal with problems and issues which arise during the pendency of the vast majority of lawsuits. In other words, the very reason for the adoption of rules and guidelines is their ability to deal with 99% of the problems and issues presented in our courts of law. But within the greatest attribute of such rules and guidelines lies the most glaring fault. Once in a great while a lawsuit, or group of lawsuits, such as these "Nazi Collaborator Denaturalization Cases" presents problems and issues which conventional rules and guidelines cannot handle. As a result, one of two things occurs. Either the trial court makes changes and alterations in the conventional rules and guidelines to adopt to the particular unique facts and circumstances of the case, thereby assuring fairness in the proceeding, or the trial court stubbornly abides by the standard rules and procedures and the lawsuit becomes tainted with inequities. Unfortunately, in the instant lawsuit, the latter rather than the former occurred.

Due process is a living rather than a stagnant concept. In fact, due process lives and breathes by expanding or deflating so as to encompass the exigencies of new developments. *United States v. Ash, supra.* Obviously, when due process ceases to breathe, equity and fairness die.

In the instant matter, there is not just one instance where traditional rules and concepts as applied in their conventional manner failed to assure the petitioner due process of law. There are numerous instances, some of major importance and others less significant, which all snowballed throughout the pendency of this lawsuit resulting in an avalanche at trial.

Probably the most glaring inequity between the parties not only in this case but in these types of cases in general, is the financial imbalance, and the ability to have money to purchase manpower (investigators and the like) and witnesses (both lay and expert). Clearly, anytime the government is a party to a lawsuit the potential for imbalance in regard to financial resources is present. But in most instances, conventional rules and guidelines can rectify the imbalance and minimize the inequities, thereby giving both parties an equal opportunity to investigate and pursue factual matters. But, in the instant matter, the financial inequities were never resolved.

Beyond, the apparent financial imbalance between the two principals herein, we also must look to supporting casts. While the petitioner stood alone, the government received the overzealous assistance of Israel, not to mention the cooperation and assistance of the West German and Soviet governments. Furthermore, the government received the cooperation of other foreign governments in scanning the globe for witnesses.

As a result, the government was able, either through its own personnel or through the personnel of foreign governments, to conduct worldwide investigations, identification procedures, and depositions. In the end the government was able to produce lay witnesses from the Middle East, Europe, and South America, not to mention

expert witnesses from Europe and all parts of the continental United States, while the petitioner was compelled to almost exclusively rely on witnesses from the Greater Cleveland area, information from foreign governments which was first filtered through the State and Justice Departments, and discovery through written interrogatories.

As the trial court in *United States v. Fedorenko, supra,* and the appellate court in *United States v. Walus, supra,* recognized, these "Nazi Collaborator" cases are unique in the annals of our jurisprudence simply by virtue of the extreme passage of time. The extreme passage of time presents countless problems with investigations, discovery and identifications. Beyond these problems lie the international obstacles of language barriers, distance, the involvement of foreign governments, and financial resources. Therefore, in order to assure the defendant due process these cases cannot be dealt with along conventional lines. Accordingly, the writ should issue.

CONCLUSION

For the above-stated reasons, the Petition for Writ of Certiorari should be granted and the judgments of the Court of Appeals and District Court reversed.

Respectfully submitted,

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